

THE NPA'S DECISION TO PROSECUTE 'APARTHEID ERA' CRIMES

FW de Klerk Foundation Editorial

On 27 June the NPA welcomed the judgement of the Supreme Court of Appeal to dismiss the stay of prosecution application of 82-year-old Joao Rodrigues. Rodrigues had been charged with the murder of Ahmed Timol, an SACP activist, in October 1971. It added that the judgement aligned with its commitment - and the commitment of the Hawks - to prosecute perpetrators of apartheid era crimes - where there was sufficient evidence.

The NPA announced that it was expanding its capacity to deal with the 53 cases that it had already identified. It was setting up a specialist unit to deal exclusively with apartheid era prosecutions and would be appointing former prosecutors and 34 detectives for this purpose.

All of this ignores entirely the fact that amnesty was, from the outset, a *sine qua non* for the negotiations between the ANC and the National Party government. The NP government originally proposed that the Norgaard principles should be used to determine who should reasonably be granted indemnity or amnesty. The principles had been successfully applied in Namibia and allowed amnesty for all those who had committed offences in the pursuit of political objectives - unless they had made use of egregious or disproportionate violence. However, the NP government was forced to abandon the Norgaard principles as the ANC's price for returning to negotiations after 26 September 1992. The ANC demanded the release of all its cadres who were still in prison and insisted that political motive should be the only requirement.

The NP government adopted the Further Indemnity Act in November 1992 in terms of which the only substantive requirement for indemnity was political motive. 1 477 people were subsequently released from prison - the vast majority of whom were members of the ANC and allied organisations - and many of whom had been convicted for "necklace murders" and other egregious crimes.

One of the greatest failures of the NP's negotiators was their inability to conclude a comprehensive amnesty agreement before the 1994 elections. However, the final paragraphs of the 1993 Constitution stated peremptorily that "amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past' (emphasis added).

Nevertheless, the 1995 Promotion of National Unity and Reconciliation Act circumvented the clear intention of the interim Constitution and set conditions for amnesty that were far more onerous than those that the ANC had insisted on with regard to the release of its own supporters in terms of the Further Indemnity Act of 1992. The Act set a much higher standard for amnesty than political motive by requiring applicants to "make full disclosure of all the relevant facts relating to acts associated with a political objective" and to "comply with additional requirements set out in the Act." It was then up to the TRC's Amnesty Committee to decide whether or not the applicants had made a full disclosure. It was on this basis that the Committee refused amnesty to Janus Walusz and Clive Derby-Lewis for the assassination of Chris Hani - which, although reprehensible, had indisputably been a political act.

Because of an informal agreement between the ANC leadership and former operatives of the pre-1994 government, the NPA suspended its prosecutions of apartheid era crimes. However, in June 2019, in another matter affecting Rodrigues, the Gauteng High Court instructed the National Director of Public Prosecutions, Adv Shamila Batoyhi, to enquire whether improper influence had been brought to bear on the NPA in suspending apartheid era prosecutions.



The result would appear to be the NPA's recently announced decision to proceed with the prosecutions. However, when it embarks on this course the NPA should give very careful consideration to the constitutional requirement that "everyone is equal before the law and has the right to equal protection and benefit of the law."

It would accordingly be unacceptable to apply one standard to "apartheid era crimes" and another to crimes perpetrated by anti-government organisations. And yet there is not the slightest indication in the NPA's statement that it has any intention whatsoever to prosecute the latter. This is despite the fact is that the vast majority of the approximately 22 000 people who were killed in political violence between 1984 and 1994 died in the conflict between the ANC and the IFP or as a result of the actions of other anti-government organisations.

The struggle has been meticulously documented in Anthea Jeffery's "People's War" - in which she exposes the ANC's campaign to eliminate its revolutionary competitors. Crimes committed by the ANC and other anti-government organisations included the assassinations of more than 400 IFP leaders and the necklace killings of more than 560 people. They also included the killing of 53 IFP protesters outside the ANC's headquarters at Shell House on 28 March 1994. Little or nothing has been done to investigate these killings or to bring those responsible to account. Yet each of these deaths also left grieving families searching for closure.

The NPA should also recall that amnesty was not granted to 27 senior ANC leaders - many who are still alive - who had applied unsuccessfully to the TRC for collective amnesty and who were in overall command of the ANC's revolutionary activities.

If the NPA chooses to prosecute only those from the anti-revolutionary side it will be in clear breach of its constitutional obligation to exercise its functions 'without fear, favour or prejudice.' If it does not act in a scrupulously even-handed manner, it will be difficult to avoid the perception that the trials that would ensue would be political trials.

The question arises why the NPA is so intent on pursuing a course of action that is likely to polarize even further our deeply divide society? Why is it committing so many of its limited resources to raking over crimes that occurred more than 27 years ago - instead of the prosecuting the rampant corruption that is tearing the country apart - or trying to bring to justice the killers of the 21 325 people who were murdered last year (i.e., almost the same number as those who were killed in the political struggle between 1984 - 1994)?

One-sided prosecutions would be irreconcilable with the 1993 Constitution's call for 'understanding but not for vengeance'; reparation but not for retaliation;' and 'ubuntu but not victimisation'.